United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

530

No. 22064

BEATRICE HAMMONDS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

STANLEY KLAVAN
818 - 18th Street, N. W.
Washington, D. C. 20006

Attorney for Appellant
(Appointed By This Court)

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TABLE OF CASES

*Cases principally relied upon.

APPLICABLE STATUTES

District of Columbia Code, (1967 Ed.)

§22-501. Assault with intent to kill, rob, rape, or poison.

> "Every person convicted with assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years."

§22-502. Assault with intent to commit mayhem or with dangerous weapon.

> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

Title 18, Federal Rules of Criminal Procedure

Rule 24(a) Trial jurors.

> "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jorors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

Rule 52(b) Plain error.

> "Plain errors affecting substantial rights may be noticed although they were not brought to the attention of the court."

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was defendant denied a fair trial as the result of the selection of a juror who had given an unintelligible response to a double question asked on the voir dire examination?

2. Was defendant denied a fair trial on the charge of assault with intent to kill by the failure of the trial court to (a) sufficiently define specific intent and (b) instruct on the effect of voluntary intoxication on specific intent?

3. Was it plain error for the trial court to fail to instruct on the issue of defendant's voluntary intoxication insofar as this affected the specific intent necessary to commit the offense of assault with intent to kill even though this instruction was not requested by appointed counsel who also failed to object to its omission?

A. If it is not plain error to fail to instruct on the issue of voluntary intoxication, is it nevertheless prejudicial error requiring reversal when the defendant is represented by appointed counsel whom she did not select?

4. Was defendant denied a fair trial as a result of testimony elecited relative to the complaining witness' wounds and as a result of statements made by the prosecutor?

5. Should the defendant be resentenced as a result of the trial court's incorrect statement as to the maximum sentence which could be imposed?

STATEMENT OF THE CASE

This is an appeal from a conviction of assault with a dangerous weapon and assault with intent to kill.

The defendant was charged, in a two-count indictment, with assaulting one Patricia Smith with a dangerous weapon, that is, a knife, on April 7, 1967, and with assaulting the said Patricia Smith on April 7, 1967, with the intent to kill.

On August 11, 1967, defendant was arraigned and entered a not guilty plea. She apparently remained in custody until December 12, 1967, when she was granted a "daytime release" from 7:00 A.M. until 7:00 P.M. daily on the conditions that she (a) not partake of alcoholic drinks, (b) not contact other parties in the case, and (c) not visit complainant.

On January 9, 1968, defendant was sentenced to a ninety-day term for drunkeness and her bond in the instant case was revoked.

Trial commenced on March 14, 1968, and the verdict convicting on both counts was returned on March 19, 1968. Defendant was sentenced on May 10, 1968, to one (1) year to four (4) years on each count, said sentences to run concurrently.

On May 17, 1968, leave to appeal was granted. Jurisdiction of this appeal is vested pursuant to 28 U.S.C. §1291.

At trial the following facts developed:

On April 7, 1967, defendant, Patricia Smith (the complainant), William Thomas Floyd, and several other men and women were residing at a home owned by Mr. Floyd located at 405 First Street, Southeast (TR 17, 23, 41, 73). Defendant had been living there for about three years (TR 46, 73) and Miss Smith for about two or three months (TR 41, 74).

At approximately 9:00 A.M. on that day, defendant and Miss Smith began getting their change together to purchase some wine (TR 24), (as they both had the shakes) (TR 25), and at 10:00 o'clock A.M. defendant returned from a nearby liquor store with a pint of Wild Irish Rose (TR 24). At about 10:30 o'clock A.M. Ann Colbert ("Shoes") arrived and obtained a fifth of wine (TR 25), which was consumed by defendant, Miss Smith, Miss Fredericks, and Miss Colbert (TR 26). At about 11:00 o'clock A.M. a man identified as Jack, who was a friend of the defendant, arrived with six pints of one-hundred-proof whiskey (TR 75).

According to Miss Smith she had nothing more to drink that day (TR 27, 35), but this statement was controverted by the defendant (TR 76) and by Mr. Floyd who stated that she showed the effects of drinking (TR 44, 45) when he and Miss Smith went upstairs to bed. Apparently, the consumption of alcohol continued throughout the afternoon until approximately 5:30 o'clock P.M. when Mr. Floyd returned from work (TR 28, 80).

Defendant testified that she left the house between 6:30 and 7:00 o'clock P.M. (TR 78, 80, 82, 83) and walked down to New Jersey Avenue to get a cab (Tr 78). After a period of approximately one-half hour she got a taxi and went to Joe's Restaurant at Seventh & P Streets, Northwest (TR 78), operated by Miss Gertrude Kohook (TR 79). Defendant stated that she

remained at the restaurant until after closing at 12:00 o'clock P.M. and thereafter went to a party at the house of Flora Ward (TR 79), and did not return home to 405 First Street, Southeast, until 7:00 o'clock A.M. the next day (TR 83) at which time she was arrested.

Witness Gertrude Kahook testified that she remembered seeing the defendant in her restaurant on a Friday in April, and that defendant arrived between 9:30 and 10:00 o'clock P.M. (TR 67, 79). On cross-examination she was able to recall the date more vividly, recollecting that there was a birthday party for her friend, McArthur Caldwell, who's birthday is April 7 (TR 69). Miss Kahook further testified that defendant did not appear to be upset (TR 68). She did not notice whether defendant had been drinking (TR 70).

Miss Smith testified that she went downstairs to fix herself something to eat at about 8:00 o'clock P.M. (TR 29, 30) and that when she came down the steps to the ground floor she saw the defendant standing by the front door looking out the screen (TR 37, 38). Miss Fredericks, Miss Colbert and Mr. Reed were sitting in the front room (TR 34, 38). Miss Smith further stated that there were no words between herself and the defendant (TR 31, 36, 37) but the defendent stabbed her from behind (TR 37). Miss Smith stated that she remembered hearing a scream but

could not recall whether it was her own or one of the ladies in the front room (TR 30, 31).

Mr. Floyd testified that about 9:00 o'clock P.M. (TR 46), after Miss Smith went downstairs, he heard a holler (TR 42) and heard Miss Smith call "Bea, oh, Bea, don't do this to me." (TR 43). He stated that he ran downstairs, heard a door slam and saw a woman running down the street (TR 43). He was unable to identify defendant as the fleeing woman (TR 52). Floyd further testified that there had been an "acrimonious exchange" between the two women for about an hour or so prior (TR 45), that Miss Stevens had been drinking and was loud and difficult to get along with that night (TR 49), and that he separated them, told defendant to go to her room, and took Miss Smith upstairs (TR 44). Mr. Floyd saw Mr. Reed and Mr. Fredericks in the house after the stabbing but did not see Miss Colbert (TR 48). Mr. Floyd also stated that there had been prior altercations between Miss Smith and the defendant.

Private John R. While stated that he responded to the home address at approximately 10:00 P.M. and saw the complainant who was lying in the living room "cut pretty bad" (TR 54), and that "some of the insides hanging out, they had to place back in her." He could not recall any other information and had no records.

Dr. Edil R. Bethan, on behalf of the Government, testified that Miss Smith was admitted to the Emergency Room at Casualty Hospital between 10:30 and 11:00 o'clock P.M. (TR 59). He stated she had been stabbed in the abdomen and chest, was in a shock-like but critical condition, although conscious (TR 59). He described the size of the wounds (TR 59), the treatment given her (TR 60), the depth of her wounds (TR 61). He finally rendered his opinion that her wounds had been inflicted by a knife (TR 61).

Private Wayne A. Layfield stated that he arrested the defendant at 7:05 o'clock A.M. on April 8, 1967.

At trial during the voir dire examination of the prospective jury panel conducted by the court, the Court asked the members of the panel to stand if any of them or their immediate family had been the victim of any criminal offense, whether it be assault or stealing of an automobile, robbery, housebreaking, larceny or any type of criminal offense. The following colloquy took place.

> "PROSPECTIVE JUROR. My name is Carol Settles. My husband is a cab driver and was robbed in December of 1967.
>
> "The Court. Was there an arrest and trial resulting"
>
> "PROSPECTIVE JUROR. Not particularly in this instance of his case; an arrest a little later on a man that was robbed by the same person.

"THE COURT. Did your husband testify?

"PROSPECTIVE JUROR. No

"THE COURT. Anything about that experience which would cause you to be prejudiced at the outset so that you couldn't be a fair and impartial juror in this case; you are sure you could try this case on the sworn testimony?

"PROSPECTIVE JUROR. Yes."
(TR 6, 7)

Subsequent, Carol Settles was on the list of jurors selected (TR 12).

In a bench conference conducted during the voir dire examination, theCourt was informed of the fact that the complainant was four or five months pregnant at the time of the alleged assault. (TR 10). Defendant's attorney objected to the disclosure of such information, and although the Court agreed that it should not be brought out, ultimately stated it was sufficient to show the pregnancy, that it had some bearing on the defendant (TR 11, 12). During the course of the trial, the prosecutor brought out the fact of Miss Smith's pregnancy in his opening statement (TR 15), and on cross-examination of the defendant (TR 84), although it was never directly put into evidence by the complainant. His preoccupation with the pregnancy and the severity of the wound was evidenced by the testimony elicited from Private While, Dr. Bethan and Mr. Floyd.

ARGUMENT

I

DEFENDANT WAS DEPRIVED OF HER RIGHT TO A FAIR TRIAL BECAUSE A JUROR WHOSE PARTIALITY WAS UNDETERMINED WAS IMPANELLED

(Defendant desires the Court to read Pages 6 and 7 of the Reporter's Transcript.)

Prior to the trial of this case, the court conducted the voir dire examination of the prospective panel. During the course of the examination, the court discussed basic principles and asked basic questions to determine whether any juror would be unable to render a fair and impartial trial to the defendant.

Midway through the examination, the court asked whether any member of the panel or his immediate family had been the victim of any criminal offense "whether it be assault or stealing of an automobile, robbery,housebreaking, larceny or any type of criminal offense." (TR 6) At this one Carol Settles stood up and the following colloquy took place:

> "THE COURT. Anything about that experience which would cause you to be prejudiced at the outset so that you couldn't be a fair and impartial juror in this case; you are sure you could try this case on the sworn testimony?
>
> "PROSPECTIVE JUROR. Yes." (TR 6-7)

In effect, the court asked the prospective juror the double question viz, whether she was prejudiced and whether she was not

not prejudiced, to which the answer was an inexplicable "yes." Thereafter Carol Settles was among the jurors impanelled to return a verdict on defendant's guilt. The same routine occurred with another prospective juror, Mary Dunn, but she was not on the final jury list (TR 7).

There can be no doubt that the trial court has great latitude in the conduct of voir dire examinations, and broad discretion as to the questions that may be asked. F.R.Crim.P. 24(a), 18 U.S.C.; Sellers v. United States, 106 U.S.App.D.C. 209, 271 F.2d 475 (1960). Yet it is equally clear that the exercise of that discretion is "subject to the essential demands of fairness." Adridge v. United States, 233 U.S. 308, 310, 75 L.Ed. 1054, 51 S.Ct. 470 (1931); Brown v. United States, 119 U.S.App.D.C. 203, 338 F.2d 543 (1964). This case does not involve the abuse of discretion in refusing to permit an inquiry concerning partiality; rather, it involves the action of the court in permitting a juror to be impanelled who has either already admitted prejudice or created a serious doubt as to such prejudice. In reality, it is impossible to tell retrospectively whether Carol Settles was certain of her own partiality or not. The fact that subsequent general questions concerning partiality were asked does not absolve the problem because, once having spoken out and hearing no more from the court, she could

assume that her position had been stated.

While the government may assert that this defect was waived by the failure of defendant's court-appointed counsel to interpose timely objection or issue a challenge for cause, the procedural defect herein could not be deemed waived in the absence of evidence that it resulted from deliberate choice made by counsel and participated in by his client. Wade v. Yeager, 377 F.2d 841 (3rd Cir. 1967). The controlling standard for determining waiver is well established; there must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938); Fay v. Noia, 372 U.S. 391, 439, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963). There was no such evidence in the trial record of the instant case.

II

THE TRIAL COURT'S INSTRUCTIONS ON SPECIFIC INTENT (a) DID NOT PROPERLY ADVISE THE JURY OF THE REQUISITE ELEMENTS AND (b) DID NOT MENTION THE EFFECTS OF INTOXICATION ON THE FORMATION OF SUCH INTENT

(Defendant desires the Court to read Page 106 of the Reporter's Transcript)

A. The trial court erred in instructing the jury with respect to the requisite intent to secure a conviction for assault with intent to kill.

Defendant is entitled to instructions relating to any theory of defense for which there is a foundation in the evidence, although the evidence may be weak, insufficient, inconsistent, or of doubtful credibility, or the evidence against him may seem overwhelming

Tatum v. United States, 88 U.S.App.D.C. 386, 390; 190 F.2d 612, 616 (1951); Spencer Womack v. United States, 119 U.S.App.D.C. 40, 336 F.2d 959 (1964). Thus defendant would surely be entitled to detailed instructions with respect to the absence of any one element of an offense. The responsibility for instruction the jury on the essential elements of crime rests upon the court, and the failure to meet that special responsibility is not excused by the absence of objection by counsel. Barry v. United States, 109 U.S.App.D.C. 301, 302, 287 F.2d 340, 341 (1961); F.R.Crim.P. Rule 52(b), 18 U.S.C. This is especially true where the failure to interpose timely objection to a critical omission, which has deprived defendant of due process and a fair trial, has been made by court-appointed counsel. United States v. Smith, 353 F.2d 166, 168 (4th Cir. 1965).

Defendant was charged with two separate offenses, assault with a dangerous weapon (D.C. Code §22-502), and assault with intent to kill (D.C. Code §22-501); while both charges arose out of a single act, they have been held to be maintainable on the ground that each offense requires proof of a fact or elements which the other does not. Ingram v. United States, 122 U.S.App.D.C. 345, 346, 353 F.2d 872, 873 (1965). One essential element prerequisite to assault with intent to kill is the specific intent to commit either manslaughter or murder. Davis v. United States, 16 App.D.C. 442

(1900); Coratola v. United States, 24 App.D.C. 229 (1904).

At the close of the trial, the trial court gave the following instructions to the jury on the issue of specific intent:

> "Now the defendant asserted in the second count of the indictment as Assault with Intent to Kill. An assault phrase of that offense is the same as Assault with a Dangerous Weapon. As assault is defined by law as an unlawful attempt or effort with force and violence to do injury to the person of another coupled with the present apparent possibility of carrying out such an attempt and if such an attempt was made with intent to kill, then the offense is known as assault with intent to kill.
>
> In order to sustain this charge in the second count, an assault with intent to kill, it is necessary for the Government to prove in addition to the elements. An assault, as I have defined for you that there was a specific intent on the part of the defendant to kill the complaining witness in this case. Intent is proved by what a person says or by what the person says or by what a person does." (TR 106)

Defendant submits that these instructions were too general and did not adequately define the distinctions between general and specific intent. Specifically, defendant urges that the Court was bound to instruct the jury that a much higher degree of mindfullness is required for the specific intent required in the offense of assault with intent to kill.[1/] Intent may not be presumed in an offense requiring specific intent unless it is shown that the offense was committed knowingly. Nelson v.

1/ Defendant submits further that the instruction as to "reasonable doubt" should have referred specifically to the various elements of the offenses and particularly that the jury must be satisfied beyond a reasonable doubt that the defendant attempted to kill the complainant, knowingly and consciously, with evil purpose, believing that death would be the natural and probable consequence of the act. McAffee v. United States, 70 App.D.C. 142, 150 105 F.2d 21 (1936)

United States, 97 U.S. App.D.C. 6,227 F.2d 21 (1955). The severity of the Court's omissions is manifestly reinforced when viewed against the fact that defendant was also charged with assault with a deadly weapon, a form of aggravated assault not requiring specific intent, because the proper distinctions were not drawn and the jury may have felt that conviction of the latter necessitated conviction of the former.

B. The Court's Instruction on Specific Intent Did not Advise the Jury on the Effect of Drunkenness although There Was Ample Evidence in the case to Necessitate Instruction on This Point.

While the trial court gave general instructions on specific intent [TR 106], nothing was said to explain to the jury that it was essential that "the defendant was sober enough to be capable of forming this intent," and that the jury should acquit defendant if there was reasonable doubt as to defendant's capacity. Edwards v. United States, 84 U.S.App.D.C. 310, 172 F.2d 884 (1949).

The issues of alcoholism and of the consumption of alcohol during the day of the assault were consistently and continuously brought out at trial. From 9:00 o'clock in the morning, when the complainant and defendant had the shakes [TR 25], and

thereafter throughout the rest of the day and into the evening, there was ample evidence[1/] furnished by the complainant, Mr. Floyd, and the defendant that defendant had been drinking heavily. The statements by the trial court at the sentencing hearing demonstrate that the court was well aware of defendant's habitual inebriation and her condition on the day in question [TR 114-115].

While a person who has become voluntarily intoxicated is not absolved of criminal responsibility for crime in general, Easter v. District of Columbia, 124 U.S.App.D.C. 33, 361 F.2d 50 (1966), drunkenness is relevant to the issue of intent in the category of crimes where specific intent is required. Heideman v. United States, 104 U.S.App.D.C. 128, 259 F.2d 943 (1958), cert. den. 359 U.S. 959, 3 L.Ed. 767, 79 S.Ct. 800 (1959).

Although assault with a deadly weapon does not require specific intent, Parker v. United States, 123 U.S.App.D.C. 343, 359 F.2d 1009 (1966), proof of specific intent is a prerequisite to conviction of assault with intent to kill. Edwards v. United States, supra. The failure of the trial court to instruct on this issue where intoxication is in the case has been held reversible error. Spencer Womack v. United States, supra. As this court there stated, the defendant

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1/ See, for example, the transcript at pp. 24-27, 35-36, 44, 49-50, 75-76, 83, 114-115.

> "'is entitled to an instruction on drunkenness as bearing on intent . . . if sufficient evidence on the intoxication issue has been introduced so that a reasonable man could possibly entertain a doubt therefrom that the accused was able to form the necessary intent.'" [citation omitted]

It is patently clear that there was sufficient evidence in the case to require an instruction on the ability of defendant to form the requisite specific intent in the event the jury disbelieved her "alibi" testimony and determined that she had committed the alleged act. Edwards v. United States, supra; Heideman v. United States, supra.

Inasmuch as such an instruction was vital to defendant, it is the duty of this court to notice and correct the plain error incident to its omission, even if it was not brought to the attention of the trial judge in the usual manner. Barry v. United States, 70 App.D.C. 142, 151, 105 F.2d 21, 30 (1939); Meadows v. United States, 65 App.D.C. 275, 82 F.2d 881 (1936); Paxton v. United States, 97 U.S.App.D.C. 173, 176 222 F.2d 794, 797 (1955); F. R. CrimP., rule 52(b), 18 U.S.C.

Furthermore, notwithstanding the fact that counsel can offer this court no authority on the point, it is appellant's contention that all prejudicial error is reversible error when an indigent defendant has counsel appointed for her. Appellant submits that in these circumstances counsel for an indigent is held to the highest standards of the bar and

unless it can be clearly demonstrated that a prejudicial error occurred as a calculated part of the trial strategy, joined in by the defendant, this court should notice and correct the error.

III

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY PREJUDICIAL STATEMENTS MADE BY THE PROSECUTOR AND BY TESTIMONY ELICITED BY HIM.

(Defendant desires the courtto read pp. 10, 11, 12, 15, 16, 54, 55, 59, 60, 61, and 84 of the Reporter's Transcript.)

It is well established that in criminal trials no evidence may be introduced that does not directly tend to prove or disprove the matter in issue. Bowman v. United States, 50 App.D.C. 90, 267 F. 648 (1920). To be admissible, evidence must have some potential probative weight upon the issues under trial. Herman L. Womack v. United States, 111 U.S.App.D.C. 8, 294 F.2d 204 (1961), cert. den. 365 U.S. 859, 5 L.Ed. 2d 822, 81 S.Ct. 826.

Defendant submits that (1) the statements by the prosecutor concerning complainant's pregnancy at the time of the assault, and (2) testimony of several witnesses concerning the severity, depth, size, condition and treatment of complainant's wounds were prejudicial and irrelevant and deprived defendant of a fair trial.

At the close of the voir dire examination, the prosecutor approached the bench and the following colloquy ensued:

"MR. LUMBARD. I should have mentioned this earlier. It is a fact for which might influence some of the jurors. It is alleged that the complainant was somewhere between four and five and a half months pregnant and as a result of being stabbed she lost her baby. This might affect some of the women on the Panel.

"MR. GARBER. I would put this on the record. I would object to any such testimony or to any facts of that nature coming to the attention of the jury for the simple reason I don't think it goes to the merits of this case. This defendant is charged with assaulting with intent to kill or assault with a dangerous weapon. The fact she may have lost a child, I don't think that has anything to do with the elements of the offense.

"THE COURT. It has some bearing on the defendant but I think it's inflammatory; there is mitigating danger if there was a verdict. It might come back for re-trial. I think it would be better if it were not brought out.

"MR. LUMBARD. The problem is the nature of the wound; she was stabbed in the abdomen.

"THE COURT. It can be brought out that she was pregnant at the time. No harm in that. What happened four or five months later?

"MR. LUMBARD. She lost the baby at the time.

"THE COURT. At the very time? It's pretty inflammatory and it's so parallel, when you have some of these pictures. The Court has to use discretion in determining which ones are to be received on account of the possibility of inflaming the jury unduly and getting away from the consideration of the evidence. I don't think it's necessary to establish the case. You can show the pregnancy and I think that is sufficient.

> I would be a little concerned about the possibility of coming back if there is a verdict. I try to protect these verdicts and I don't think it's going to make any difference if you get a verdict in this case. You had better caution your witnesses so they won't intentionally --
>
> (END OF BENCH CONFERENCE - IN OPEN COURT)"
>
> [TR 10, 11, 12]

It is obvious that the trial court was aware of the prejudicial nature of such evidence and that the court cautioned against the introduction of evidence on the pregnancy and the fact that the child was lost. Apparently, however, the court relented and agreed to permit evidence on the fact of pregnancy to be introduced.

Thereafter, in his opening statement, the prosecutor stated:

> "We expect the evidence to show that at the time of this attack the plaintiff, Patricia Smith was some four or five months pregnant. As a result of these two blows, Patricia Smith, we expect to show, passed out, did not revive until she was at Casualty Hospital. We expect to show that she was in the hospital over three weeks whereupon she left upon the advice of the physician, that she underwent considerable surgery as a result of this attack." [TR 15, 16]

Defendant submits that, while the court has a large measure of discretion in the admission of evidence, it was an abuse of discretion to permit any statements by the prosecutor on the question of pregnancy. This was inflammatory and had no bearing on any issue in the case. Assuming, arguendo,

that it was not an abuse of discretion, there was error by the mention of pregnancy because it was never established by a proper foundation in the evidence at trial. No questions were asked the complainant or Mr. Floyd to establish pregnancy, yet the prosecutor, without any foundation therefor, again brought up the subject in his cross-examination of defendant:

> "Q You said that Patricia Smith was Willie Floyd's common law wife?
>
> "A That's right.
>
> "Q In fact, she was pregnant by him at that time?
>
> "A I wouldn't know whether she was or not."

[TR 84]

Defendant urges that the statements by the prosecutor created prejudice and deprived her of a fair trial. Frank v. United States, 104 U.S.App.D.C. 384, 262 F.2d 695 (1958).

Additionally, defendant urges that the testimony of Officer While and Dr. Bettran, witnesses for the Government, created prejudice in that the major part of their testimony was inflammatory and without probative value. Private While was not the arresting officer in this case; the only relevant aspect of his testimony was that complainant had been stabbed with a knife. Yet the prosecutor elicited statements

from the police officer that complainant "was cut pretty bad" [TR 54] and that "she had been cut in the stomach; some of the insides hanging out they had to place back in her. They put her on a stretcher and carried her out" [TR 55].

Again, with respect to Dr. Bettran, the only relevant matter that could have been elicited was that the injury resulted from "a sharp pointed instrument, possibly a knife" [TR 61]. Yet, notwithstanding this, the prosecutor went into great depth as to her condition and blood pressure on admission [TR 59], the size (approximately 2.3 centimeters) of her wound [TR 59], intravenous therapy [TR 60], that her condition was critical [TR 60], and that her wound "was pretty deep" [TR 61].

IV

INASMUCH AS THE TRIAL COURT BELIEVED THAT CONSECUTIVE SENTENCES COULD BE IMPOSED, THE CASE MUST BE REMANDED

(Defendant desires the Court to read pp. 112, 113, and 114 of the Reporter's Transcript.)

This court has held that while the offenses of assault with intent to kill and assault with a deadly weapon are separate and distinct, the single act by which they were committed may not "be punished cumulatively as both a

more and a less serious form of aggravated assault," and that there cannot be a "pyramiding of the penalties." Ingram v. United States, supra, 122 U.S.App.D.C., at p. 346, 353 F.2d at p. 873. There this court held that consecutive sentences may not be imposed for the crimes which defendant was convicted, stating:

> ". . . we cannot say with any certainty that Congress intended that one assault with a knife in an attempt to kill would be twice punished because it was an assault with a knife. To say such an act constitutes both an assault with a deadly weapon and an assault with intent to kill does not say that the punishment may be twofold where the offenses are comingled in one assault, unless it can be said also that two punishments were intended by Congress. We think this cannot be said. . . . it is unlikely that Congress intended a single act to be punished cumulatively as both a more and a less serious form of aggravated assault."

At the sentencing hearing, the trial court stated:

> ". . . you are aware of the fact that the Court may sentence you under the charge in which you are convicted of Assault with a Dangerous Weapon not more than ten years and Assault with Intent to Kill, twenty-five years if I were to give you consecutive sentences. . . ." [TR 114]

As explained in the Ingram case, the theory that consecutive sentences may be imposed incident to the convictions herein is erroneous.

The court was advised by defendant's counsel that this was the first felony conviction of the defendant [TR 112].

The matter was confirmed by the court in an examination of the defendant's prior criminal record [TR 113-114]. Ultimately, the court imposed concurrent sentences of one to four years on each count. Inasmuch as there is no method by which this court can examine the mental processes of the trial judge, it must be assumed that, in the absence of clarification in the record, the sentences were imposed pursuant to this erroneous premise.

CONCLUSION

Appellant submits that the verdict entered against her should be reversed and this case remanded for a new trial.

Respectfully submitted,

Stanley Klavan

Stanley Klavan
818 - 18th Street, N.W.
Washington, D.C. 20006
298-9191

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was delivered to the Office of the United States Attorney, United States Courthouse, Third and Constitution Avenue, Northwest, Washington, D.C., this 8th day of August, 1968.

Stanley Klavan

Stanley Klavan
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,064

BEATRICE HAMMONDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
THOMAS LUMBARD,
CLARENCE A. JACOBSON,
Assistant United States Attorneys.

Cr. No. 722-67

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Was appellant deprived of a fair trial by the fact that a particular juror sat on the case, where during voir dire the juror indicated that a member of her family had been a crime victim but that she was sure that neither that prior experience nor any other reason would prevent her from being fair and impartial, and where experienced trial counsel did not seek to strike her either for cause or peremptorily?

2. Was evidence as to the stabbing victim's being four or five months pregnant when stabbed and as to the nature and extent of her wounds properly introduced and admitted at trial?

3. Were the trial judge's instructions, indicating that assault with intent to kill required the specific intent to kill and omitting any reference to intoxication as a defense, sufficient and proper where trial counsel made no related special requests or objections and where there was no direct evidence to support an intoxication defense?

4. Was there any appealable error in apppellant's sentencing where the trial judge indicated that the two offenses could bring consecutive sentences but where he in fact imposed concurrent sentences and indicated that the amount was the very minimum he could impose under the circumstances of the case?

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* This case has not previously been before this Court under the same or similar title.

INDEX

TABLE OF CASES

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,064

BEATRICE HAMMONDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 14, 15 and 18, 1968, appellant was tried by jury before Judge Luther W. Youngdahl on charges of assault with a dangerous weapon [1] and assault with intent to kill,[2] the charges arising out of the knife stabbing of Patricia Ann Smith on April 7, 1967. The jury found appellant guilty of both charges, and Judge Youngdahl imposed concurrent sentences of one to four years imprisonment.

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[1] 22 D.C. Code § 502 (1967).

[2] 22 D.C. Code § 501 (1967).

The material trial events and evidence were the following. During the voir dire questioning conducted by Judge Youngdahl, one of the prospective jurors, who was subsequently selected and not struck, responded yes to the question whether she or any member of her immediate family had been the victim of a crime. She was then asked by Judge Youngdahl whether anything about the experience would prevent her from being a fair and impartial juror and then whether she was sure she could try the case fairly solely on the sworn testimony. The prospective juror responded yes after the second question.[3] At the conclusion of the general questioning Judge Youngdahl asked all of the prospective jurors whether they knew of any reason, in light of all his questions or otherwise, why they could not be fair and impartial jurors. No one responded yes. (Tr. 12.)

Prior to Judge Youngdahl's final voir dire question, government counsel, to insure that none of the prospective jurors would be unfairly influenced, informed the court at the bench that Patricia Smith was four or five months pregnant at the time she was stabbed and that she had lost her baby as a result of the stabbing. Judge Young-

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[3] The colloquy between Judge Youngdahl and the prospective juror is set out below (Tr. 6-7):

> [THE COURT] . . . Any member of this Panel or of your immediate family been the victim of any criminal offense whether it be assault or stealing of an automobile, robbery, housebreaking, larceny or any type of criminal offense?
>
> Stand up, please.
>
> PROSPECTIVE JUROR. My name is Carol Settles. My husband is a cab driver and was robbed in December of 1967.
>
> THE COURT. Was there an arrest and trial resulting?
>
> PROSPECTIVE JUROR. Not particularly in the instance of his case; an arrest a little later on a man that was robbed by the same person.
>
> THE COURT. Did your husband testify?
>
> PROSPECTIVE JUROR. No.
>
> THE COURT. Anything about that experience which would cause you to be prejudiced at the outset so that you couldn't be a fair and impartial juror in this case; you are sure you could try this case on the sworn testimony?
>
> PROSPECTIVE JUROR. Yes.

dahl ruled that the victim's pregnancy could be brought out because it reflected on the nature of the act charged but that the loss of the baby should not be brought out because it might be too inflammatory. (Tr. 10-12.)

The government's evidence showed that on April 7, 1967, Patricia Smith and appellant were living in a rooming house, at 405 First Street, Southeast, in the District of Columbia. The two had known each other for eight or nine months prior to April 7, while they were both living there. Miss Smith shared an upstairs apartment at 405 with her common-law husband, William Floyd. (Tr. 16-18.) Miss Smith and appellant had done some drinking during the day of April 7 (Tr. 24-26), and Thomas Floyd came home from work around seven in the evening (Tr. 42). He noticed some arguing between appellant and Miss Smith (Tr. 44, 51). Miss Smith fixed some dinner for her husband (Tr. 28), and afterwards the two went upstairs to their living quarters (Tr. 42). Sometime later, around 8:30 or 9:00, Miss Smith went back downstairs to go to the kitchen (Tr. 18, 29-30, 46). She passed appellant on her way to the kitchen, and as she did so, got stabbed in the chest from behind. She turned around and appellant stabbed her a second time, in the abdomen. There was a scream, and Miss Smith fell unconscious. (Tr. 18-19, 30, 59.) During the stabbing Thomas Floyd was upstairs, but he heard his wife scream "Bea, Oh Bea,[4] don't do this to me." He ran downstairs, heard the front door slam and saw a woman running down the street. (Tr. 42-43.) Miss Smith was seriously wounded, some of her stomach insides were hanging out and had to be placed back in her; she was transported to Casualty Hospital and admitted in critical condition. (Tr. 54-55, 58-61.) Appellant did not reappear at 405 until around seven the next morning, at which time she was arrested (Tr. 63-64).

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[4] Bea was the short name by which Patricia Smith referred to appellant. See Tr. 29.

Prior to putting on defense evidence, appellant's counsel indicated that her defense was alibi (Tr. 65). Appellant denied having stabbed Patricia Smith (Tr. 79). She claimed that she had left 405 around seven p.m. on April 7, had gone over to 7th and P, Northwest, and had then gone to Joe's Restaurant, at 1540 7th Street, Northwest, where she spent the rest of the evening (Tr. 66, 77-79). She stated that she was sober on April 7 (Tr. 77). The manager of Joe's Restaurant had seen appellant there, apparently on the evening of April 7, but she had not seen her there earlier than 9:30 (Tr. 66-67). She also indicated that appellant was sober when she saw her that night (Tr. 69).

There were no special instruction requests. Judge Youngdahl's instructions included a statement on the element of specific intent required for conviction of assault with intent to kill (Tr. 106), and defense counsel expressed satisfaction with the judge's charge (Tr. 110).

At the sentencing hearing, Judge Youngdahl indicated that the two convictions could bring 10 and 25 years respectively if he were to sentence consecutively, but stated he was not going to give consecutive sentences. He imposed a one to four year concurrent sentence, stating that that was the very minimum he could give under the circumstances (Tr. 114-15).

ARGUMENT

I. Any question of partiality on the part of one of the sitting jurors was effectively removed by the trial judge's voir dire questioning.

(Tr. 6-7, 12)

Appellant first contends that there was error because a juror of questionable partiality was permitted to sit on the case. A fair reading of the transcript indicates that no partiality was present.[5] The transcript is a bit confusing in that separate responses are not recorded to Judge Youngdahl's separate questions of whether any-

[5] See note 3, *supra*.

thing about the prospective juror's prior experience would prevent her from being a fair and impartial juror and whether she was sure she could try the case fairly solely on the evidence. The confusion is most likely due to a failure by the court reporter to record a negative response, possibly a non-verbal head shake, to the first question. The affirmative response clearly relates to second question, the juror thereby saying she was sure she could try the case fairly. That no question of partiality remained is made certain by the negative response of all prospective jurors to Judge Youngdahl's final general question and by the fact that experienced trial counsel did not move to strike the juror in question, either for cause or peremptorily.

II. Evidence as to the nature of the stabbing victim's wounds and the fact that she was pregnant when stabbed was properly introduced and admitted into evidence.

(Tr. 10-12, 15, 54, 55, 59, 84)

Appellant argues that she was deprived of a fair trial by testimony relating to the nature of the wounds sustained by the stabbing victim and by references by government counsel to the fact that the victim was four or five months pregnant when stabbed.[6] Evidence of the extent of the wounds is certainly highly probative as to the element of assault in the two charges and, more particularly, as to whether it was the type of assault that reflected an intent to kill. As such the evidence was properly introduced.[7] As to the references to Patricia Smith's being pregnant, government counsel displayed his good faith by bringing the pregnancy and loss of child question to the attention of the court prior to making any reference to it. The pregnancy condition, presumably vis-

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[6] See Tr. 15, 54, 55, 59, 84.

[7] See *Fields* v. *State*, 160 Tex. Crim. 498, 272 S.W.2d 120 (1954); *People* v. *Hopkins*, 29 Ill.2d 260, 194 N.E.2d 213 (1963); *O'Bryant* v. *State*, 222 Ga. 326, 149 S.E.2d 654 (1966); *Middleton* v. *State*, —— Tex. Crim. ——, 402 S.W.2d 900 (1966).

ible at four or five months, coupled with the fact that the second stab was to the abdomen, is certainly probative as to appellant's intent at the time of the stabbing. Judge Youngdahl acted to protect appellant from undue prejudice by ruling that reference could only be made to the pregnancy and not to loss of child. Government counsel, in his subsequent statements and questions, complied completely with the judge's ruling.

III. The trial judge's instructions were sufficient and proper.

(Tr. 65, 77, 106, 110)

Appellant contends that the trial judge committed reversible error by not adequately instructing on the specific intent element of assault with intent to kill and by not instructing on intoxication as a defense to a specific intent crime. The argument is without merit. Judge Youngdahl sufficiently covered the specific intent element by informing the jury that assault with intent to kill as distinct from assault with a dangerous weapon required the specific intent to kill.[8] In light of there being ample evidentiary basis for concluding intent to kill, the fact that there was no additional elaboration on the nature of specific intent cannot reasonably be viewed as reversible error, absent a special request or objection by appellant's trial counsel.[9]

Judge Youngdahl's not giving an intoxication instruction should also not be questioned on appeal because no appropriate request or objection was made at trial.[10] Even

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[8] *Jackson* v. *United States*, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965); *Byrd* v. *United States*, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965).

[9] *Madison* v. *United States*, 125 U.S. App. D.C. 26, 365 F.2d 959 (1966); *Barkley* v. *United States*, 116 U.S. App. D.C. 334, 323 F.2d 804 (1963).

[10] Trial counsel's failure to request the intoxication instruction in no way reflects lack of competence in light of appellant's own indication at trial that she was not intoxicated on the date in question. Tr. 77.

if a request had been made, denial would have been proper in light of there being no direct evidence to support appellant's being intoxicated.[11]

IV. Appellant's sentencing presents no appealable issue and was error free.

(Tr. 114-15)

Appellant finally argues the case should be remanded for resentencing because the judge allegedly indicated that he believed consecutive sentences could be imposed on the two charges, even though he in fact imposed concurrent sentences. Appellant's appropriate recourse for seeking reduction of sentence is not by appeal to this Court but by filing an appropriate motion with the trial court.[12] Moreover, whether or not Judge Youngdahl actually believed that imposing consecutive sentences would have been legally permissible is irrelevant in light of the fact that he imposed concurrent sentences and indicated that the sentence amount was the very minimum he could impose under the circumstances.

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[11] *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); see *Levine* v. *United States*, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958).

[12] F.R. Crim. P. 35.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
THOMAS LUMBARD,
CLARENCE A. JACOBSON,
Assistant United States Attorneys.

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